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In The
Supreme Court of the United States
October Term, 1985

CERTAIN UNNAMED PROSPECTIVE DEFENDANTS,

Petitioners,

vs.

NEWSPAPERS, INC.; WTMJ, INC.; GREEN BAY PRESS GAZETTE; WISN-TV, Division of the Hearst Corporation; WISN RADIO and WBTT RADIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the guarantee of the right to trial by an impartial jury, subsumed within the Fourteenth Amendment's Due Process Clause, require a state to close a hearing on a petition for issuance of criminal charges absent any showing that the protections afforded by measures such as voir dire and jury selection will be insufficient to assure prospective defendants a fair trial?

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JURISDICTION

The Court lacks jurisdiction over this case since the decision of the Wisconsin Supreme Court sought to be reviewed is not a final judgment or decree under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistence of Counsel for his defence.

United States Constitution Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes Section 757.14 (1983)

> The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with crime; provided, that when in any court a cause of a scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the Court is sitting all minors not necessarily present as parties or witnesses.

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, Respondents' statement of the case will be limited to the correction of omissions from the statement of Petitioners.

During the January 17, 1985 hearing on the motion to determine whether any proceedings on the petition for issuance of a criminal complaint would be open to the public, the Petitioners made no showing of any kind that the usual protective measures available to insure the impartiality of the jury impaneled in a criminal case would be insufficient to protect against any prejudicial publicity that might arise from public and news media attendance at such proceedings. In addition, Wisconsin Circuit Court Judge Arlene D. Connors made no findings in support of her decision to close the proceedings that such alternative measures would be insufficient to protect the Petitioners' rights to a fair trial.

SUMMARY OF ARGUMENT

The decision of the Wisconsin Supreme Court which Petitioners seek to have reviewed is not a final judgment or decree within the meaning of 28 U.S.C. § 1257 because the federal question involved will likely be the subject of further proceedings in the state courts, and its consideration by this Court now would be likely to result in piecemeal review.

The Petition for Writ of Certiorari should be denied because the only federal question raised: namely, whether the right of a criminal defendant to be tried by an im-

partial jury requires limitations on public access to judicial proceedings even where alternatives to such limitations may be sufficient to assure an impartial jury, has already been settled by this Court and the other questions upon which Petitioners seek review are not properly presented by this record.

ARGUMENT

I. This Court Lacks Jurisdiction To Grant The Writ Since The Opinion Of The Wisconsin Supreme Court Is Not A Final Judgment Or Decree Under 28 U.S.C. § 1257.

Petitioners assert jurisdiction under 28 U.S.C. § 1257 (3). That statute limits this Court's jurisdiction to review of state court decisions constituting "a final judgment or decree" rendered by the highest court of the state in question. 28 U.S.C.A. § 1257 (1966). The final judgment rule of § 1257 has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State Court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In the context of criminal proceedings, the final judgment is normally the imposition of the sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). Here, there has not only been no sentence imposed, but the state trial court has not even determined whether a criminal complaint will be filed.

Although the Wisconsin Supreme Court passed on the federal question of whether the Petitioners' rights to an impartial jury require closure of the hearing under section 968.02(3) of the Wisconsin Statutes based upon the record before it, the ultimate determination, if any, of this issue will have to await a trial and verdict on the criminal accusations still pending before the Wisconsin circuit court. Thus, assertion of this Court's jurisdiction at this stage of the proceedings would result in piecemeal review, the very evil at which the final judgment rule is aimed. *See Flynt v. Ohio*, 451 U.S. at 621.

II. The Writ Should Be Denied Because The Only Federal Question Resolved By The Wisconsin Supreme Court Is One That Has Already Been Settled By This Court.

The only federal issue addressed by the Wisconsin Supreme Court in its decision below was whether the rights of Petitioners to trial by an impartial jury justified closure of the proceedings on the petition for issuance of a criminal complaint based upon the record compiled before the circuit court judge. *State ex rel. Newspapers, Inc. v. Circuit Court*, 124 Wis. 2d 499, 511-12, 370 N.W.2d 209, 215-16 (1985). The court did not resolve any question involving the first amendment, but held only that the hearing on the petition to issue a criminal complaint was presumptively open to the public as a matter of Wisconsin law. *Id.* at 505-07, 370 N.W.2d at 213-14. In applying the so-called "compelling necessity" standard to the case, the court relied exclusively on its own prior decisions concerning openness of government proceedings and records in Wisconsin. *See id.* at 507, 370 N.W.2d at 214.

The issue of whether an open proceeding would violate the prospective defendants' rights to an impartial jury, while discussed by the Wisconsin Supreme Court, was not, and could not be, conclusively resolved by that court. While recognizing that a legitimate fear that substantial publicity would hinder efforts to provide a fair trial might conceivably justify closure, *id.* at 508, 370 N.W.2d at 214, the court held that "the potential threat to a fair trial arising out of an open section 968.02(3) hearing in this instance was much too speculative to justify closure." *Id.* at 511, 370 N.W.2d at 216. The court noted the alternative protections afforded by voir dire, change of venue, instructions and admonishments to the jury and the like, as well as the ultimate remedy of setting aside a verdict because of prejudicial publicity, and held that the potential threat to a fair trial "in this case under these circumstances does not in itself compel a closed hearing." *Id.* at 511-12, 370 N.W.2d at 215-16.

The Wisconsin court's analysis of the constitutional fair trial guarantee as a limitation on public access to judicial proceedings is squarely in line with this Court's prior pronouncements on this subject. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court noted that:

> [P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." . . . Appellate evaluations as to the impact of publicity

> take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

427 U.S. at 565 (citations omitted). The Court has repeatedly declared that an assessment of the efficacy of alternative protective measures is required whenever closure of a judicial proceeding is sought as a means of preserving other interests; *see, e.g., Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 2216 (1984); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 511 (1984); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580-81 (1980); and has eschewed reading the constitutional guarantee of an impartial jury as an absolute bar to certain forms of publicity. *See Chandler v. Florida,* 449 U.S. 560, 575 (1981).

The Wisconsin Supreme Court has interpreted section 968.02(3) of that state's statutes as providing for a presumptively open judicial proceeding subject to closure only upon a compelling showing that overriding public values, such as a defendant's interest in trial by an impartial jury, will be subverted by a public proceeding. This Court is bound by Wisconsin's construction of its statute. *See Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). Only if the record in this case demonstrates that the application of the Wisconsin statute has deprived the Petitioners of rights secured by the federal constitution can this Court grant Petitioners any relief. Since the Court has consistently interpreted the constitutional guarantee of the right to an impartial jury as requiring limitations on public access to judicial proceedings only where no alternatives would suffice to protect this interest, the record in

this case demonstrates that review by this Court is inappropriate.

Petitioners' contention that this case would make "an ideal companion case" to *Press-Enterprise Co. v. Superior Court,* No. 84-1560, is without merit. The questions presented in the *Press-Enterprise* case are whether the first amendment right of access to criminal proceedings extends to preliminary hearings and whether the California statute governing closure of preliminary hearings violates that amendment. Since the instant case presents no first amendment issue at all, it clearly is not a proper companion for *Press-Enterprise.*

CONCLUSION

The Court lacks jurisdiction under 28 U.S.C. § 1257 to review the Wisconsin Supreme Court's decision of an interlocutory appeal. Even if such jurisdiction exists, the

Court should deny the Petition for Writ of Certiorari since it presents no new federal question for resolution by the Court.

Certiorari should be denied.

Dated December 18, 1985.

Respectfully submitted,

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